International Criminal Court ICC-ASP/1/C.1/L.1

Assembly of States Parties

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Proposal submitted by Mexico in relation to a draft agreement on the privileges and immunities of the International Criminal Court

New article 22 bis

1. During the negotiation of the draft Agreement on the Privileges and Immunities of the International Criminal Court, an issue was raised regarding the privileges and immunities to be granted to nationals and permanent residents in the State of their nationality or residence. Due to lack of time, no decision was taken by the Preparatory Commission. However, delegations agreed that the issue was important and merited further consideration. A note recommending that the Assembly of States Parties examine the question when considering the draft Agreement on Privileges and Immunities of the ICC was included in the report of the Preparatory Commission (see PCNICC/2001/1, para. 8).

2. In order to facilitate such examination, the following proposal is submitted for the consideration of delegations participating at the first session of the Assembly of States Parties to the ICC Statute:

"Article 22 bis
"National and permanent residents

"1. Except insofar as additional privileges and immunities may be granted by the State Party concerned, and without prejudice to paragraph 6 of article 15 and paragraph 1 (d) of article 16, a person referred to in articles 15, 16, 18, 19 and 21 shall, in the territory of the State Party of which he or she is a national or permanent resident, enjoy only the following privileges and immunities to the extent necessary for the independent performance of his or her functions or his or her appearance or testimony before the Court:

(a) Immunity from personal arrest and detention;

(b) Immunity from legal process of every kind in respect of words spoken or written and all acts performed by that person in the performance of his or her functions for the Court or in the course of his or her appearance or

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testimony, which immunity shall continue to be accorded even after the person has ceased to exercise his or her functions for the Court or his or her appearance or testimony before it;

(c) Inviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions for the Court or his or her appearance or testimony before it;

(d) For the purposes of their communications with the Court and for a person referred to in article 19, with his or her counsel in connection with his or her testimony, the right to receive and send papers in whatever form.

"2. Except insofar as additional privileges and immunities may be granted by the State Party concerned, a person referred to in articles 20 and 22 shall, in the territory of the State Party of which he or she is a national or permanent resident, enjoy only the following privileges and immunities to the extent necessary for his or her appearance before the Court:

(a) Immunity from personal arrest and detention;

(b) Immunity from legal process in respect of words spoken or written and all acts performed by that person in the course of his or her appearance before the Court, which immunity shall continue to be accorded even after his or her appearance before the Court."

1. Explanation

3. In general, nationals and permanent residents do not enjoy in the State of their nationality or residence the same privileges and immunities granted to other persons under international law.

4. The inclusion of a provision in the draft Agreement clarifying the scope of privileges and immunities to be granted to national and permanent representatives will reflect existing international practice and facilitate the ratification of the Agreement by States.

5. Draft article 22 is not, however, an absolute prohibition and leaves open the option for States to grant additional privileges and immunities to their national or permanent residents where required.

6. The proposed draft takes into account the kind of privileges and immunities that permanent or national residents will definitely need to perform their functions before the Court.

2. Explanation of the drafting of the discussion document

7. Articles 13, 14 and 17 were omitted from the scope of the proposal since articles 13 and 14 already solve the issue of privileges and immunities granted to State representatives in the State of their nationality and article 17 grants very limited privileges and immunities.

8. It was necessary to split the proposal into two paragraphs, the first dealing with persons referred to in articles 15, 16, 18, 19 and 21, and the second with persons referred to in articles 20 and 22, the reason being the difference in the kind of privileges and immunities granted in those provisions. Giving the same treatment

to both categories will have the effect of enlarging the privileges and immunities granted to victims and other persons in articles 20 and 22.

9. Since not all the persons mentioned in paragraph 1 perform functions for the Court (in particular, witnesses), the chapeau includes the phrase "to the extent necessary for the independent performance of his or her functions or his or her appearance or testimony before the Court". This language is intended to include all persons covered by the provision.

10. The drafting used follows current language of the draft Agreement.

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Report of the Working Group of the Whole

Introduction

1. The Working Group of the Whole of the Assembly of States Parties to the Rome Statute of the International Criminal Court, established at the 1st meeting of the Assembly, on 3 September 2002, held six meetings, from 3 to 6 September. The President of the Assembly, H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan), served as Chairman of the Working Group of the Whole.

2. The Deputy Director of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, Ms. Mahnoush H. Arsanjani, acted as Secretary of the Working Group of the Whole. The Codification Division provided the substantive servicing for the Working Group.

3. At the 1st meeting of the Assembly, on 3 September 2002, the following items were assigned for consideration of the Working Group of the Whole: Rules of Procedure and Evidence, Elements of Crimes, an agreement on the privileges and immunities of the Court, a relationship agreement between the Court and the United Nations, financial regulations and rules, basic principles governing a headquarters agreement to be negotiated between the Court and the host country, consideration of remaining draft resolutions or decisions in the report of the Preparatory Commission, decisions concerning the next meeting, including the date and venue, as well as other matters. At its 2nd meeting, on 3 September 2002, the Assembly also assigned to the Working Group the consideration of the procedure for the nomination and election of judges to the Court.

4. The Working Group held formal meetings and informal consultations. At its 1st meeting, on 3 September 2002, it established informal consultations on the procedure for the nomination and election of judges, under the chairmanship of Mr. Don MacKay (New Zealand).

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Consideration of the report of the Preparatory Commission

5. At its 2nd meeting, on 4 September 2002, the Working Group of the Whole adopted by consensus the finalized draft text of the Rules of Procedure and Evidence (PCNICC/2000/1/Add.1).

6. At the same meeting, the delegation of Spain made a statement after the adoption of the Rules of Procedure and Evidence, drawing the attention of the Assembly to the last paragraph of the explanatory note to the Rules of Procedure and Evidence and in that connection expressing the hope that the Assembly would take up the matter raised therein in due course.

7. Also at its 2nd meeting, the Working Group of the Whole adopted by consensus the finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2).

8. At the same meeting, the Working Group of the Whole adopted by consensus the Agreement on the Privileges and Immunities of the Court (PCNICC/2001/1/Add.3), amended as follows:

The title of the Agreement shall read:

"Agreement on the Privileges and Immunities of the International Criminal Court"

A new article 23 shall be inserted, reading:

"Article 23
"Nationals and permanent residents

"At the time of signature, ratification, acceptance, approval or accession, any State may declare that:

(a) Without prejudice to paragraph 6 of article 15 and paragraph 1 (d) of article 16, a person referred to in articles 15, 16, 18, 19 and 21 shall, in the territory of the State Party of which he or she is a national or permanent resident, enjoy only the following privileges and immunities to the extent necessary for the independent performance of his or her functions or his or her appearance or testimony before the Court:

(i) Immunity from personal arrest and detention;

(ii) Immunity from legal process of every kind in respect of words spoken or written and all acts performed by that person in the performance of his or her functions for the Court or in the course of his or her appearance or testimony, which immunity shall continue to be accorded even after the person has ceased to exercise his or her functions for the Court or his or her appearance or testimony before it;

(iii) Inviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions for the Court or his or her appearance or testimony before it;

(iv) For the purposes of their communications with the Court and for a person referred to in article 19, with his or her counsel in connection with

his or her testimony, the right to receive and send papers in whatever form;

(b) A person referred to in articles 20 and 22 shall, in the territory of the State Party of which he or she is a national or permanent resident, enjoy only the following privileges and immunities to the extent necessary for his or her appearance before the Court:

(i) Immunity from personal arrest and detention;

(ii) Immunity from legal process in respect of words spoken or written and all acts performed by that person in the course of his or her appearance before the Court, which immunity shall continue to be accorded even after his or her appearance before the Court."

Paragraph 1 of article 33 shall read:

"The present Agreement shall be open for signature by all States, from 10 September 2002 until 30 June 2004, at United Nations Headquarters in New York."

Articles 23 to 38 shall be renumbered accordingly.

9. At its 2nd meeting, the Working Group of the Whole also adopted by consensus a Relationship Agreement between the Court and the United Nations (PCNICC/2001/1/Add.1).

10. At the same meeting, the delegation of Spain made a statement after the adoption of the Relationship Agreement between the Court and the United Nations. It expressed its understanding that the Assembly of States Parties would consider in due time the possibility to request an advisory opinion from the International Court of Justice within the context of the dispute settlement provision of article 119, paragraph 2, of the Rome Statute. The delegation of Canada made a statement recalling the need for considering the question of registration of frequencies by the Court with the International Telecommunication Union.

11. At its 3rd meeting, on 4 September 2002, the Working Group of the Whole adopted by consensus the Financial Regulations and Rules (PCNICC/2001/1/Add.2 and Corr.1 and PCNICC/2002/1/Add.2).

12. At the same meeting, the Working Group of the Whole adopted by consensus the basic principles governing a headquarters agreement to be negotiated between the Court and the host country (PCNICC/2002/1/Add.1).

13. At its 4th meeting, on 5 September 2002, the Working Group of the Whole adopted by consensus the draft resolution on the continuity of work in respect of the crime of aggression, contained in PCNICC/2002/2/Add.2.

14. At the same meeting, the Working Group of the Whole adopted by consensus the following resolutions and decisions:

(a) Draft resolution concerning the provisional arrangements for the secretariat of the Assembly of States Parties (PCNICC/2002/1, annex I);

(b) Draft resolution relating to the permanent secretariat of the Assembly of States Parties (PCNICC/2002/2, annex X);

(c) Draft resolution relating to the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims (PCNICC/2002/2, annex XIII);

(d) Draft resolution relating to the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims (PCNICC/2002/2, annex XIV);

(e) Draft decision relating to the participation of the International Criminal Court in the United Nations Joint Staff Pension Fund (PCNICC/2002/2, annex VIII);

(f) Draft resolution relating to selection of the staff of the International Criminal Court (PCNICC/2002/2, annex IX).

15. At the same meeting, the Working Group decided to transmit to the International Criminal Court the report of the intersessional meeting of experts held at The Hague from 11 to 15 March 2002 (PCNICC/2002/INF/2), containing summaries of staff regulations and rules relevant for provisional application by the Court at the initial stages of its establishment. The Working Group also decided to await further developments on the question of the establishment of an international criminal bar (PCNICC/2002/2, para. 14) before taking further action and to consider this issue at a future session of the Assembly.

16. At its ... meeting, on ... September 2002, the Working Group of the Whole adopted by consensus the draft resolution relating to the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court (PCNICC/2002/2, annex XII), amended as follows:

Paragraph 12, subparagraphs (b) and (c), should read:

"(b) ... with a minimum of 6 candidates from each regional group; if on 1 November 2002 the number of States Parties of any given regional group is less than three eighteenths of the total number of States Parties to the Rome Statute at that moment, this minimum shall be 4; or

"(c) ... with a minimum of 10 candidates from each gender."

Paragraph 13, subparagraphs (b) and (c), should read:

"(b) The number of candidates presented by States Parties members of one regional group is less than 6; if on 30 November 2002 the number of States Parties of any given regional group is less than three eighteenths of the total number of States Parties to the Rome Statute at that moment, this number shall be 4; or

"(c) There are less than 10 candidates from each gender."

Insert the following as new paragraph 19 bis:

"19 bis. The election of judges shall be conducted on the basis of the procedure contained in the resolution on the procedure for the election of the judges of the International Criminal Court, adopted by the Assembly of States Parties on [9] September 2002, as contained in document ...."

17. At the same meeting, the Working Group of the Whole adopted the following draft resolution:

"Draft resolution on the procedure for the election of the judges for the International Criminal Court

"*The Assembly of States Parties,*

"*Bearing in mind* the provisions of the Rome Statute of the International Criminal Court,

"*Mindful* of the Rules of Procedure of the Assembly of States Parties,

"*Convinced* of the need to fully implement the provisions of article 36 of the Rome Statute,

"*Approves* the following procedure for the election of the judges of the International Criminal Court:

"1. The persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting. However, no more than 13 candidates from list A and no more than 9 candidates from list B shall be considered elected.

"2. States Parties shall, in the election of judges, take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They shall take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.

"3. Each State Party shall vote for a maximum number of 18 candidates, whereby it shall observe the following minimum voting requirements:

(a) Each State Party shall vote for at least 9 candidates from list A and at least 5 candidates from list B;

(b) Each State Party shall vote for at least:

- 3 candidates from the Group of African States,
- 3 candidates from the Group of Asian States,
- 3 candidates from the Group of Eastern European States,
- 3 candidates from the Group of Latin American and Caribbean States, and
- 3 candidates from the Group of Western European and other States.

"For the purposes of the first election and on an exceptional basis, if the number of States Parties of any given regional group is less than three eighteenths of the total number of States Parties to the Rome Statute at that moment, the minimum voting requirement for that group shall be adjusted by subtracting 1.

"If the number of candidates from a regional group is not at least double the respective minimum voting requirement, the minimum voting requirement shall be half the number of candidates from that region (rounded up to the nearest whole number, where applicable). If there is only one candidate from a regional group, there shall be no minimum voting requirement for that region.

(c) Each State Party shall vote for at least six candidates from each gender. However, if the number of candidates from one gender is 10 or less, the minimum voting requirement for that gender shall be in accordance with the following formula:

Number of candidates	*Minimum voting requirement*
10	6
9	6
8	5
7	5
6	4
5	3
4	2
3	1
2	1
1	0

"4. If, after the first ballot, fewer than 18 candidates are elected, the maximum number of votes by a State Party, which is 18 for the first ballot, shall be reduced, for each subsequent ballot, by subtracting the number of elected candidates.

"5. The minimum voting requirements as reflected in paragraph 3 shall apply, mutatis mutandis, for subsequent elections.

"6. If, after the first ballot, fewer than 18 candidates are elected, the following adjustments shall apply to subsequent ballots:

(a) The minimum voting requirement referred to in lists A and B shall be adjusted, list by list, by subtracting the number of elected candidates;

(b) The minimum regional voting requirement shall be adjusted, group by group, by subtracting the number of elected candidates;

(c) The minimum gender voting requirement shall be adjusted, gender by gender, by subtracting the number of elected candidates.

"7. Each minimum voting requirement shall be adjusted until that requirement can no longer be met, whereupon the use of that requirement shall be discontinued. If an adjusted voting requirement can be met individually, but not jointly, the use of all regional and gender voting requirements shall be discontinued. If, following four ballots, 18 judges still have not yet been elected, these minimum voting requirements shall be discontinued.

"8. Only ballot papers observing the minimum voting requirements shall be valid. If a State Party fulfils the minimum requirements using less than the maximum number of votes allowed for that ballot, it may abstain in voting for the remaining candidates.

"9. The President of the Assembly of States Parties shall be responsible for the election procedure, including the determination, adjustment or discontinuation of the minimum voting requirements.

"10. Ballot papers shall be organized in a manner facilitating such an election process. The minimum voting requirements, adjusted requirements and the discontinuation of any requirements shall be clearly indicated on the ballot papers. Before the day of the election, the President shall distribute to all States Parties copies of the instructions and samples of the ballot papers. On the day of the election, clear instructions and sufficient time shall be given for each ballot. In each ballot, before the voting process is concluded, the President shall repeat the instructions and the minimum requirements to allow each delegation to verify that its vote meets those requirements.

"11. The Assembly of States Parties shall review the procedure for the election of judges on the occasion of future elections with a view to making any improvements as may be necessary."

18. Before the adoption of the resolution, the delegation of Nigeria made a statement expressing the concern that the complicated nature of the voting mechanism might not guarantee the election of a minimum of three judges in the Court for the Group of African States. The delegation of France observed that the future application of the provisions of paragraph 5 of the resolution would have to be reconsidered, particularly taking into consideration the fact that at the first subsequent election only six judges would be elected by the Assembly. The delegation of Spain noted that the draft resolution only contained a very general reference to the criterion relating to the representation of the principal legal systems of the world, which was the first criterion under the provisions of paragraph 8 (a) of article 36 of the Statute. Accordingly, it was suggested that the instructions referred to in paragraph 10 of the draft resolution should highlight that criterion.